SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 476

SEARS, ROEBUCK AND CO., *Petitioner*,

v.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

and

FRANCIS SPERANDEO, Regional Director of the Twenty-seventh Region of the NATIONAL LABOR RELATIONS BOARD, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO

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1. Proceedings on the Merits of the Underlying Dispute.

On the Regional Director's complaint, and after a hearing, a Trial Examiner of the NLRB issued a decision on February 6, 1969, finding that the Union had violated Section 8(b)(4)(i)(ii)(B) of the Act and recommending, *inter alia*, that the Board order the respondent-union to cease and desist from the activities complained of (App., p. 80). The union had urged that its picketing was "primary" since Sears was not a neutral in the dispute. But the Trial Examiner concluded that Sears does not control "the manner and means" by which the floor covering which it sells will be installed. "Rather, control is reserved *merely* with respect to the *result* sought." He therefore found that the "floor covering craftsmen" must be considered "independent contractors", and Sears a neutral in the union's dispute with the installers. He distinguished the Board's prior decision in *Carpet Center, Inc.*, 170 NLRB No. 93, where the Board found "carpet installation workers to be employees of the respondent company therein designated." (App., p. 111). The Union had further urged that since the picket signs merely complained that "floor covering sold by Sears, Roebuck & Co. is installed by underpaid workers" and asked the public to "patronize firms employing union carpet & linoleum layers", its picketing did not have the object proscribed by Section 8(b)(4)(B) (App., p. 92). However, the Trial Examiner, relying on the fact that on one prior occasion the Union had picketed one of the installers, rejected the contention (App., pp. 116-118).

On June 20, 1969, the Board issued its Decision and Order agreeing with the findings, and adopting the recommended order, of the Trial Examiner (App., p. 130). The Board, as did the Trial Examiner, dis-

tinguished its prior decision in *Carpet Center, Inc.*, 170 NLRB No. 93, on the facts. The Board also distinguished its more recent decision in *Arnold's Carpet*, 175 NLRB No. 50, where in circumstances strikingly similar to the instant case its holding was to the contrary. (App., pp. 132-133).

The Union petitioned the United States Court of Appeals for the District of Columbia Circuit, under Section 10(f) of the Act, to review and set aside the Decision and Order of the Board (App., p. 135). The Board cross-applied for enforcement of its Order. (App., p. 139).[2] Briefs have been filed and the case was argued on January 22, 1970.

2. The Section 10(l) Proceedings.

Meanwhile, in the ancillary Section 10(l) proceeding, the District Court for the District of Colorado conducted an evidentiary hearing on the Regional Director's petition for temporary injunction.[3] In an

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[2] Sears' motion to intervene was granted (App., pp. 137, 141).

[3] When the question of Sears' status arose, the following colloquy ensued:

"The Court: Wait a minute, now. Don't they have to intervene?

Mr. Giacomini [counsel for Sears]: We do not seek to intervene. Pursuant to the act, the charging party is entitled to be present in court and represented by counsel to present any testimony.

The Court: Do you have any objection?

Mr. Hornbein [counsel for the Union]: It's my understanding they have a right to appear for the limited purpose of introducing evidence and presenting testimony and for that purpose only, and we have no objection to that.

The Court: Very well." (App., p. 13).

Thus Sears was permitted to participate on that limited basis, and thereafter made no move to intervene or cause its status to be redefined.

opinion filed October 4, 1968, the Court made the following fact findings with regard to the relationship between Sears and its installers:

> "Sears does . . . contract the whole job; that is, the carpeting or floor covering, plus the services. And, carries the responsibility of seeing to it that the job is satisfactory, because it is a Sears customer . . . each of [the installers] was eligible, on a one day discount pass, whereby they could buy [Sears] merchandise for ten percent off. . . . Sears has a vital interest in the price [of the whole job] . . . because they want to compete in the community. Perhaps more than that, they wish to be able to keep their prices below those of other concerns. . . . this is evident from the fact and the testimony that they have recently found that their margin of profit was nil because the service was eating it all up. So, they insisted on having a $1.35 rate per yard. . . . [T]he overall price had been $1.65. . . . Sears then negotiated this lower rate. . . . Also Sears is responsible for collecting. . . . these contractors have nothing whatsoever to do with collecting from the purchaser. Sears does this through its machinery; its credit plan or system. And, if there is a loss as a result of a bad debt or bankruptcy, why, Sears bears the risk of the loss." (App., pp. 24-25).

The Court also responded directly to a contention of the Regional Director, later to be repeated before the Board, that a contract between Sears and the installers showed the latter to be independent contractors. The Court said: ". . . the relationship arises as a result of the printed contract between Sears and the installer . . . It's prepared by Sears." (App., p. 25). "I think that it is somewhat a legalistic relationship; an arrangement. And, that a real effort has been made to see to it that it looks like an independent contractor relationship." (App., p. 27).

In applying the law to the facts, the Court stated that "Section 8(b)(4)(B) . . . is designed to protect innocent third parties . . . from economic loss as a result of a labor dispute in which they have no concern." (App., p. 25). The Court quoted from an opinion of the Court of Appeals for the District of Columbia Circuit (where the case on the merits is now pending): "Arrangements of the type here disclosed must be scrutinized by the Board with great care because of the danger that they may be used by the real parties in interest as a device to achieve insulation from union activity." (App., p. 26, quoting from *Local 24, Teamsters* v. *NLRB*, 266 F.2d 675, 680 (1959)). The Court also relied on the *Carpet Center* case, *supra*, where the "Board itself in a case that is quite similar to this reached the same conclusion that I reach." (App., p. 27).

Based on the foregoing, the Court denied the request for injunction and dismissed the case, concluding that Sears was not a neutral in the labor dispute and that there was "little probability" that the Board would sustain the complaint on the merits. (App., pp. 27-29). The Regional Director did not appeal. Sears filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit. (App., pp. 30-31). The Union filed a Motion to Dismiss or, in the alternative, To Affirm (App., p. 36), urging *inter alia* Sears' lack of standing to independently pursue injunctive relief by initiating an appeal under Section 10(l). The Regional Director similarly moved to dismiss on that ground (App., p. 42).

On May 15, 1969, the Court dismissed the appeal. (App., p. 124). Its decision noted the restrictive language in Section 10(l) regarding the role of a charg-

ing party, the history of abuses that prompted the enactment of the Norris-LaGuardia Act and the fact that Congress had that history very much in mind when it debated and enacted Section 10(l), and the decisions of this Court cautioning against judicial dilution of the policies expressed in Norris-LaGuardia. The Court concluded that judicial expansion of the limited right conferred upon a charging party in Section 10(l) "would not only violate every sound principle of statutory construction, but would require a complete disregard for the sensitivity of the labor injunction problem." (App., p. 127).

Sears then petitioned this Court for a Writ of Certiorari, and its petition was granted on November 17, 1969 (App., p. 142).

SUMMARY OF ARGUMENT

I

1. This case is moot. The issue presented for decision is whether a charging party has standing to initiate an appeal from the denial by a district court of a Section 10(l) injunction. A resolution of that issue, however, would be "devoid of practical effect" (*A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 328 (1961)). For a Section 10(l) injunction, by the terms of the Section, cannot extend beyond "the final adjudication of the Board with respect to" the underlying dispute; and the "final adjudication" of the Board was in fact rendered on June 20, 1969 (App., p. 130). Hence no 10(l) injunction may issue at this time. If the Court affirms the decision below, its ruling merely requires something to be done which has already taken place—namely, dismissal of the Petitioner's appeal in the court below for lack of standing.

If the Court reverses, it in effect orders that the Petitioner be permitted to pursue a remedy which, at this stage of the litigation, the lower courts are powerless to provide. Since a ruling on the merits "cannot affect the result as to the thing in issue" (*California* v. *San Pablo & Tulare Railroad Co.*, 149 U.S. 308, 314 (1893)), the case should be dismissed as moot.

2. The Petitioner's reliance on *Southern Pacific Terminal* v. *I.C.C.*, 219 U.S. 498 (1911) is misplaced. The question there was whether the expiration of a two-year order of the I.C.C., requiring the terminal company to cease and desist from giving an undue preference to a certain shipper, rendered the case moot before it reached this Court. The Court rejected the mootness argument on the grounds that "the order of the Commission may to some extent . . . be the basis of further proceedings," and that the consideration of the underlying question "ought not to be . . . defeated, by short-term orders, capable of repetition, yet evading review. . . ." (219 U.S. at 515-516). In other words, a decision on the merits was necessary because the I.C.C. order, although technically expired, would otherwise continue to influence the economic activities of the parties. Their certain knowledge that the I.C.C. would be empowered to continue its attack on their mutually advantageous arrangement by successive two-year orders not subject to review would undoubtedly inhibit their freedom of action. No such consideration, however, is present in the instant case. What the Petitioner complains of is not an order aimed at regulating its activities, but a decision of the court below denying its standing to aim an injunctive shaft at the activities of its adversary. If this Court decides that the case is moot because it cannot affect

the result, no threatened order or legal process remains to influence or regulate the Petitioner's future conduct. For these reasons, the exception to the mootness rule embodied in the *Southern Pacific Terminal* case does not apply.

3. The Petitioner further contends that the case is not moot because the Board's June 20, 1969 Order lost its "finality" when the Union sought its review in the Court of Appeals. This is a tortured construction of the plain meaning of the words "final adjudication of the Board." It is also negated by the statutory scheme. For example, no reason appears why Congress would have specifically authorized reviewing Courts of Appeals to grant to the Board temporary injunctive relief under Sections 10(e) and (f) if indeed it had been intended that 10(l) injunctions could extend through the period of the appeal. In addition, Section 10(f) permits a "person aggrieved" to seek review of "a final order of the Board." If the reference to "final order" in that Section were to be construed as Petitioner would have us construe the almost identical language of Section 10(l), the absurd result would be to virtually eliminate Section 10(f) appeals; for each such appeal would defeat the "finality" of the Board's Order and, hence, defeat the appeal itself.

II

In any event, the decision of the court below should be affirmed. For Congress made it abundantly clear, by the statutory language and legislative history, that the courts were not to condone attempts by charging parties in Section 10(l) proceedings to seize the initiative from the Board and themselves control the litigation.

1. The language of Section 10(l) limits the role of a charging party by stating that he "shall be given an opportunity to appear by counsel and present any relevant testimony." As the Section makes clear, the Regional Director of the Board is entrusted with the responsibility of petitioning for injunctions in appropriate cases, and himself controlling the litigation. The charging party "may not substitute itself as the principal complainant." *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 242, 243 (2d Cir. 1962). Congress demonstrated that when it intended to confer "party" status it knew how to say so. For instance in Section 10(l) itself the charged labor organization is referred to as "a party to the suit." And there are similar references in Sections 10(c) and (e). Thus to permit the Petitioner to initiate an appeal from the denial of a Section 10(l) injunction would be to twist the clear language of the statute beyond its intended meaning.

2. The legislative history shows that Congress was careful not to dent its Norris-LaGuardia policy beyond allowing *the Board* to pursue the injunctive remedy in certain enumerated cases. Private litigants were not to have access to that process. The House Bill (H.R. 3020) would have permitted private litigants to petition for injunctions in secondary boycott cases (1 Leg. Hist. 77-80). The Senate Bill (S. 1126) contained the present version of Section 10(l), permitting only the Board to obtain injunctive relief (1 Leg. Hist. 131). The House measure was eliminated in conference (2 Leg. Hist. 1540, 1544; 1 Leg. Hist. 561).

On the Senate side the supporters of S. 1126 expressed "justifiable fear" that "if we permit employers to resort to court procedure on their own . . .

we may end with no legislation at all." (Remarks of Senator Ellender, 2 Leg. Hist. 1057-1058). Senator Taft, the principal sponsor of the Bill, found that "opposition to restoring the injunctive process [to employers] even in cases of secondary boycotts and jurisdictional strikes, seemed to be so strong" that, in order to save the rest of the measure, he was forced to oppose an amendment offered by Senator Ball which would have permitted private litigants to obtain injunctive relief (2 Leg. Hist. 1365). The amendment was defeated by a vote of 62 to 28. (2 Leg. Hist. 1369-1370).

Manifestly, the notion that a charging party should have standing to appeal the denial of an injunction, where the Regional Director declines to do so, is entirely foreign to the intent of Congress in the enactment of Section 10(l).

3. This Court has recognized that the import of the legislative history was to vest in the Board sole control over Section 10(l) litigation. *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442 (1948); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 204-205 (1962). In *Wagshal*, for example, the Court observed that the Labor Management Relations Act altered the law under the Norris-LaGuardia Act "only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party." (333 U.S. at 442). In obedience to that principle, lower courts have denied to charging parties in Section 10(l) proceedings the right to intervene (See, *e.g.*, *Henderson* v. *Local 701, Operating Engineers*, —— F. 2d ——, 73 LRRM 2111, 2114, fn. 2 (9th Cir. 1969)), or the right to pursue injunctive relief by staking out positions different from or independent of those taken by the Regional Director. *NLRB*

v. *Retail Clerks Union*, 243 F. 2d 777, 782-783 (9th Cir. 1956); *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 242, 243 (2d Cir. 1962).

4. This Court's decision in *Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965) is inapposite. The Court there held that successful charged and charging parties should be allowed to intervene in Court of Appeals review cases arising under Sections 10(e) and (f) of the Act. Such cases, of course, involve none of the Norris-LaGuardia considerations that shaped the enactment of Section 10(l). *Scofield* was based on this Court's view that to deny intervention in that context would probably result in additional, duplicative, appeals, with attendant "circuit shopping," and an unnecessary delay of the time when disaffected parties could seek review of the merits in this Court. However, denial of the right of a private litigant to appeal in a Section 10(l) case would have none of these effects.

5. The Petitioner also relies heavily on *Retail Clerks* v. *Food Employers Council*, 351 F. 2d 525 (9th Cir. 1965) in support of its contention that by seeking to appeal it is merely "supporting" the Regional Director's petition for injunction. But that case stands for a different proposition. There the Regional Director petitioned the district court for a Section 10(l) injunction, but subsequently asked the court—over the charging party's objection—to approve a stipulation between himself and the charged union. The court instead issued the injunction; and the Court of Appeals affirmed on the ground that the district court is not "a mere rubber stamp for the Regional Director." Thus the holding of the case is not that *the charging party* may adopt a course independent of that taken by the Re-

gional Director, but that *the district court* may do so in the exercise of its discretion as to the "form of relief to be granted." (351 F. 2d at 530).

6. Other contentions raised by the Petitioner are addressed, briefly, under heading II, sub-heading E, of the Argument.

ARGUMENT

I. THE CASE IS MOOT.

1. The issue presented for decision—whether the charging party before the Board has standing to independently appeal the denial of a Section 10(l) injunction by the district court—is no longer viable. Section 10(l) permits the issuance of an injunction "pending the final adjudication of the Board with respect to such matter." The Board's final adjudication, concluding that the Union-Respondent had violated Section 8(b)(4)(B) of the Act and ordering the Union to cease its unlawful conduct, was rendered on June 20, 1969.[4] At that point, the ultimate relief sought by the Petitioner here, namely the issuance of a Section 10(l) injunction, could no longer be granted; indeed if such an injunction were then in effect it would have expired. Accordingly, the decision of the court below and the "standing" issue presented here are "presently devoid of practical effect," and there is no "case" or "controversy" before this Court. *Carpenters' District Council* v. *Boire*, 288 F. 2d 454, 455 (5th Cir. 1961); *Monique, Inc.* v. *Boire*, 344 F. 2d 1017, 1018 (5th Cir. 1965); *Reynolds* v. *Nashville Bldg. Trades Council*,

[4] Appendix, p. 130.

[5] *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 328 (1961).

383 F. 2d 562, 564 (6th Cir. 1967); *Sowell v. International Association of Machinists, District Lodge No. 1*, ——— F. 2d ———, 72 LRRM 2980 (3d Cir. 1969).

The governing principle was stated in *Chicago, San Pablo & Tulare Railroad Co.*, 149 U.S. 308, 314 (1893):

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, *or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.*" (Emphasis added).

The instant case is precisely within the rule, for the effect of a decision on the merits would be to declare a principle "which cannot affect the result as to the thing in issue." If the Court affirms, it necessarily requires something to be done which has already taken place—namely, dismissal of the Petitioner's appeal in the court below for lack of standing. If the Court reverses, it orders that the Petitioner be permitted to

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See also *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 (1964); *Association of New York City v. New York Marine & General Insurance Co.*, 376 U.S. 775 (1964); *Hicks v. Weaver*, 302 U.S. 449, 452 (1938); *International Association of Street, Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 386 (1951); *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963).

pursue a remedy which, at this stage of the litigation, the lower courts are powerless to provide. "One would be as vain as the other."[7] In these circumstances, to express an opinion on the merits "would be to ignore [a] basic limitation upon the duty and function of the Court, and to disregard principles of judicial administration long established and repeatedly followed."[8]

2. The Petitioner seeks support from an exception to the rule, characterized by such cases as *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498 (1911), *Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *State of Missouri*, 374 U.S. 74 (1963), and *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968).[9] *Southern Pacific Terminal* was initiated by a bill in equity to enjoin an order of the I.C.C. requiring the terminal company to cease and desist (for a two-year period) from giving undue preference to a certain shipper. By the time the case reached this Court, the two-year cease and desist order had expired, and the I.C.C. suggested mootness. This Court rejected the argument on the theory that "the order of the Commission may to some extent . . . be the basis of further proceedings;" and that the consideration of the underlying question "ought not to be '. . . defeated, by short-term orders, capable of repetition, yet evading review . . . .'" (219 U.S. at

[7] *Brownlow* v. *Schwartz*, 261 U.S. 216, 217 (1923).

[8] *Local No. 86, etc.* v. *Missouri*, *supra*, fn. 6, at 367-368.

[9] Reply to Memorandum in Opposition to Petition for Writ of Certiorari, pp. 8-10 (hereafter referred to as "Reply to Memorandum").

515-516).[10] In *Amalgamated* v. *Missouri, supra,* the Union engaged in a strike against a public transit company. The same day, the Governor of the state seized the company, and thereafter secured an injunction against the strike under a State law which prohibited any strike against the utility or the State after possession has been taken by the State. The Supreme Court of Missouri affirmed the issuance of the injunction. When the case came before the Court, mootness was urged on the ground that in the interim the Governor had terminated the seizure order. The Court rejected the contention. It noted that "the labor dispute remains unresolved" and "[t]here thus exists in the present case not merely the speculative possibility of invocation of the [seizure law] in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the [seizure law]." (at 78).[11] Finally, in *Carroll* v.

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[10] The holding was further explicated in *Southern Pacific Co.* v. *I.C.C.*, 219 U.S. 433, 452 (1911), decided the same day. There the agency had issued a similar two-year order nullifying a rate that had been set by the railroad for certain shipments, and fixing instead a lower rate. The order expired before the question reached this Court. On the mootness point, the Court held: "The contention is disposed of by *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission* . . . . In addition to the considerations expressed in that case, it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined; and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy." (at 452).

[11] On that basis, the Court distinguished *Local No. 8-6, etc.* v. *Missouri, supra,* fn. 6, involving similar facts and the same seizure law, but where the underlying dispute had been settled and new collective bargaining agreements entered into prior to this Court's review of the case. As we shall show, this case is governed by *Local No. 8-6, etc.* v. *Missouri,* not *Amalgamated* v. *Missouri.*

Princess Anne, *supra*, the issue was whether the expiration of a ten-day restraining order, enjoining the National States Rights Party from holding rallies or meetings "which will tend to disturb and endanger the citizens of the County," caused the question of the legality of said order to be mooted before this Court. The Court responded in the negative. It noted that the activities of the petitioners were continuing, that public officials continued to restrict said activities on the strength of the decision below, and thus "the decision of the Maryland Court of Appeals [affirming the ten-day order] continues to play a substantial role in the response of officials to their activities." (393 U.S. at 178).

What these cases have in common is that, in each, the order or conduct complained of—if not reviewed because of mootness—would continue to have a coercive, injunctive influence on the conduct of the complainant. In each case, the order complained of had been thrust at the complainant as a sword and remained suspended in that position after its technical expiration. It could only be removed by decision of this Court. Thus, in *Southern Pacific Terminal*, the terminal company and its "preferred" shipper would be precluded from resuming an arrangement they found mutually profitable by the certain knowledge that the I.C.C. could continue to attack the arrangement by succeeding two-year orders not subject to review. And the same kind of economic coercion would characterize the post-order period in *Southern Pacific Co.* v. *I.C.C.* In *Amalgamated* v. *Missouri* the Union's strike activities would obviously be inhibited, and its bargaining position vis-a-vis the company would be weakened, by the continuing threat of repeated State seizure and concomitant injunction. And in the case of *Carroll* v. *Princess Anne*, the petitioners' exercise of First

Amendment rights could be repeatedly thwarted by the actions of public officials, backed by the state courts, in reliance on an unreviewable decision of that State's highest court. In short, this exception to the mootness rule was necessary to permit the complainants to carry on their underlying activities without the encumbrance of what were, in practical effect, continuing injunctions.

By way of contrast, the Petitioner in the instant case does not seek review of an injunctive order, or repeated threat thereof, aimed at its activities. Rather than pointing a sword at the complainant, the decision of the Court below merely prevented the Petitioner from itself brandishing an injunctive sword *against another*. If this Court decides that the case is moot, no order or legal process, or injunctive threat, would remain to influence or govern the Petitioner's future conduct.[12]

Moreover it is highly unlikely that the Petitioner would ever again be faced with all the circumstances whose confluence created the issue here—namely, picketing directed against the Petitioner which the Board's Regional Director believes violative of the Act, denial by a district court of the Regional Director's petition for a Section 10(l) injunction, and decision by the Regional Director not to appeal. "[S]uch speculative contingencies afford no basis" for a decision on the merits where, as here, the case has other-

[12] The Petitioner's complaint about "the jeopardy in which [it] now finds itself as a consequence of the absence of . . . injunctive relief . . . ." (Reply to Memorandum, p. 4) is wholly without foundation. By its own admission, the picketing ceased in June, 1969. If injunctive relief were now needed, it could be obtained by the Board in the Court of Appeals in which the appeal on the merits is pending, pursuant to Section 10(e) or (f) of the Act.

wise "lost its character as a present, live controversy." *Hall* v. *Beals*, 396 U.S. 45, 46 (1969); see also, *Brockington* v. *Rhodes*, 396 U.S. 41 (1969).

Therefore, the rule of mootness, rather than its exception, is applicable here.

3. The Petitioner's additional contention that "final adjudication of the Board" really means "final adjudication of the Board" *and reviewing courts*[13] is without merit because it ignores the plain meaning of words. And a review of the statutory scheme undermines the contention entirely. The statute contemplates that, at the outset, *pendente lite* relief may be obtained pursuant to Section 10(l), and if further such relief is required thereafter it may be obtained from the reviewing Court of Appeals. Thus under Section 10(e), when the Board petitions a Court of Appeals for enforcement of its order it may obtain in that court "appropriate temporary relief or restraining order." Similarly, under Section 10(f), when review of the Board's order is sought by "any person aggrieved" thereby, the Court of Appeals may "grant to the Board such temporary relief or restraining order as it deems just and proper." In this manner *pendente lite* relief is preserved throughout the litigation by specific references in the statute. It would have made no sense for Congress to provide for such relief in Sections 10(e) and (f) if the 10(l) injunction were intended to continue in effect until the entire litigation had run its course. Moreover, pursuant to Section 10(f) a "person aggrieved" may seek review only of "a final order of the Board." The latter phrase can have no different

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[13] Reply to Memorandum, pp. 4-8.

meaning than "the final adjudication of the Board," pending which injunction may be secured under Section 10(l). Thus if, as the Petitioner asserts, an appeal extinguishes the "finality" of a Board order, every appeal under Section 10(f) would *ipso facto* eliminate its foundation and, therefore, itself—a patently absurd result.

The Petitioner's construction of the statute is also contradicted by the legislative history. Senator Taft, the principal sponsor of the measure that ultimately became law, described the contemplated operation of Section 10(l): "... The Board can go to court and get a temporary injunction against further operation of the strike *while the National Labor Relations Board is hearing the question* as to whether it is an illegal strike or not, *and deciding whether it will issue a permanent injunction* [sic] against that particular strike." (emphasis added) (2 Legislative History of the Labor Management Relations Act of 1947, p. 1013). Taft's explanation is consistent only with a conclusion that a Section 10(l) injunction was not to extend beyond the Board's order.

That view is also confirmed by a number of cases. Thus, in *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 241 (2d Cir. 1962), the Court said: "Section 10(l) was designed by Congress to provide a means by which temporary injunctive relief could be obtained 'pending the final adjudication of the Board.' Sen. Rep. No. 105 (80th Cong. 1947), p. 27, H.R. Conf. Rep. No. 510 (80th Cong. 1947), p. 57. It does not provide relief beyond that stage .... It is clear, therefore, that if the Board holds the present case does not involve an unfair labor practice, the injunction affirmed here must

be dissolved forthwith, regardless of whether the charging party decides to appeal." See also, *Reynolds* v. *Nashville Building & Construction Trades Council*, 383 F. 2d 562 (6th Cir. 1967); *Monique, Inc.* v. *Boire*, 344 F. 2d 1017 (5th Cir. 1965); *Carpenters' District Council* v. *Boire*, 288 F. 2d 454 (5th Cir. 1961).

Apparently to the contrary is *Houston Insulation Contractors Ass'n.* v. *NLRB*, 339 F. 2d 868 (5th Cir. 1964). There the charging party-appellant sought review of the Board's dismissal of a Section 8(b)(4) complaint. Appellant asked for a stay of the Board's order, or a restraining order against the Union, pending appeal. The Board did not challenge the Court's authority to issue the stay (see Section 10(g)), but contested the power of the Court to issue a restraining order at the behest of the charging party. The Court of Appeals noted that a 10(l) injunction had issued on the Board's petition at the outset of the litigation. While recognizing that "ordinarily a § 10(l) injunction expires upon final adjudication by the Board . . ." (at 870), the Court—finding it unnecessary to decide the charging party's standing to seek injunctive relief—ordered a stay and stated that its effect would be to extend the 10(l) injunction. Since the statute requires that the 10(l) injunction expire on the issuance of the Board's order, as we have shown, the holding is incorrect insofar as it purported to extend the injunction as a consequence of the stay. The Court should have squarely faced the "standing" issue. We believe that the case is distinguishable on the ground that the Court viewed the extension of the 10(l) injunction as an incident to its conceded power to stay the Board's order. If the case is not distinguishable on that ground, it is in conflict with the later holding of the same

Court that a Section 10(l) injunction would "necessarily terminate" upon the decision of the Board. *Monique, Inc.* v. *Boire*, 344 F. 2d 1017 (5th Cir. 1965).

II. IT IS CLEAR FROM THE STATUTORY LANGUAGE, THE LEGISLATIVE HISTORY, AND DECISIONS OF THIS COURT THAT CONGRESS DID NOT INTEND TO VEST PRIVATE PERSONS WITH STANDING TO APPEAL A DENIAL OF AN INJUNCTION UNDER SECTION 10(1) OF THE ACT.

It has long been axiomatic that only a "party" has standing to appeal. *Payne* v. *Niles*, 20 How. 219, 221, 15 L. Ed. 895, 896 (1858); *United States ex rel State of Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917). Congress made it abundantly clear, by the statutory language and legislative history of the Labor Management Relations Act of 1947, that charging parties before the Board were not to have "party" status in Section 10(l) proceedings.

A. The Statutory Language.

We begin with the language of Section 10(l). It states that upon the filing of a petition by the Board "the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity *to appear by counsel and present any relevant testimony* . . ." (emphasis supplied). Not surprisingly, the Courts have held that Congress meant precisely what it said. As stated in *Phillips* v. *United Mine Workers of America*, 218 F. Supp. 103, 105-106 (D.C. Tenn. 1963), "[t]he Court cannot read into the statutory language of Section 10(l), when it permits a charging party to appear by counsel and present relevant testimony, the right of a charging party to do anything more than just that." The Second Circuit,

in *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 242, 243 (2d Cir. 1962), said:

> "We are mindful of the fact that the statute allows the charging party to appear by counsel and present relevant testimony. We believe, however, the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant."

Hence, the affirmative words used by Congress in describing the role of the charging party were meant to be "negative of other objects than those affirmed." *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 174. For had Congress intended charging parties to have a greater role, by way of intervention, party status, or appeal rights, it could have said so. For example, in the very Section under review Congress specified that the labor organization sought to be enjoined shall be "a party to the suit." Section 10(c) speaks of the participants in unfair labor practice cases before the Board's trial examiners as "parties to the proceeding." And Section 10(e), involving review of Board orders in the Courts of Appeals, states that "either party" may apply to the court for leave to adduce additional evidence.

The statutory scheme is such that only the Board may seek temporary injunctive relief in the District Courts (under Sections 10(j) and (l)) or, on review, in the Courts of Appeals (pursuant to Sections 10(e) and (f)). Indeed even under Section 10(f), where the appeal on the merits is taken not by the Board but by the "person aggrieved by a final order of the Board," the Court's jurisdiction is "to grant *to the*

Board [not to the appellant] such temporary relief or restraining order as it deems just and proper." (emphasis added). Thus both the language and structure of the statute argue against according to private litigants a greater role than is indicated by the express words of Section 10(l).

B. The Legislative History.

The legislative history of the Act conclusively demonstrates the specific intent of Congress to deny to private litigants independent access to the injunctive process, lest the time-honored policy enunciated in the Norris-LaGuardia Act (29 U.S.C.A. § 101, et seq.) be subverted.[14] We now turn to an examination of that history.

The major conflict, right from the start, was whether the injunctive process in Section 8(b)(4) situations was to be controlled by private litigants or the Board. The House Bill (H.R. 3020) embraced the former solution, while the Senate Bill (S. 1126) adopted the latter. See S. 1126, as reported (1 Leg. Hist. 131); H.R. 3020, as reported (1 Leg. Hist. 77-80); Senate Report No. 105 on S. 1126 (1 Leg. Hist. 409).[15] Proponents of the House version were ultimately forced to yield in the face of overwhelming opposition to the intrusion of private litigants in the injunctive process, and the certainty that a Presidential veto would have to be overcome.[16] There was also significant opposi-

[14] Relevant provisions of the Norris-LaGuardia Act are set forth in the Appendix to this Brief.

[15] The references are to the 2-volume Legislative History of the Labor Management Relations Act, 1947.

[16] After conferees adopted the Senate version, the veto materialized but was overridden. 1 Leg. Hist. 915-921; 1 Leg. Hist. 921-923.

tion to permitting the issuance of any injunctions whatever.[17]

The Senate debates in the month of April, 1947 described the atmosphere. Senator Ellender, a supporter of S. 1126 and reluctant supporter of the Senate version of Section 10(l), explained:

> ". . . I presented a proposal to correct the existing evil, and, after long discussion as to how best to handle the subject I followed the views of the Senator from Oregon and the Senator from New York respecting the method of dealing with the situation, which is through the Board, instead of by direct action on the part of the employer . . . I fear that if we permit employers *to resort to court procedure on their own* we may again drift into the type of abuses which brought about the passage of the Norris-LaGuardia Act . . . My fear—and I think it is a justifiable fear—is that *if we should go too far we may end with no legislation at all.*" 2 Leg. Hist. 1057-1058.

Senator Smith, a supporter of S. 1126, responded to the concern expressed in the minority report that the bill "slices a wedge out of the Norris-LaGuardia Act:"[18]

> "The only comment I can make on that statement is that we were very careful in this bill to protect

[17] See, *e.g.*, Senate Minority Report No. 105, PT 2, on S. 1126, which complained that Section 10(l) "slices a wedge out of the Norris-LaGuardia Act by making application for labor injunctions mandatory in certain types of labor disputes." 1 Leg. Hist. 167, and the remarks of Senator Murray to the same effect at 2 Leg. Hist. 1036.

[18] The emphasis shown in italics here, and elsewhere in the quotation of legislative history, is our own.

[19] *Supra*, fn. 17.

the right to control the litigation . . ." 2 Leg. Hist. 1354.

Senator Ives spoke in opposition to the Ball amendment: "... his proposal revives the injunction *upon the request of an employer* . . . there is definitely a violation of the principle of the Norris-LaGuardia Act . . . . I deplore a condition which *in any way, shape, or manner* will revive the flagrant abuses which brought about the enactment of the Norris-LaGuardia. I think the pending amendment opens the door; it is the entering wedge." 2 Leg. Hist. 1356. Senator Smith also spoke in opposition: "It is my judgment that the Norris-LaGuardia Act should be open only for injunctions *in behalf of the Government*, in the limited classes of cases provided in our bill . . . we would be making a very serious mistake to open the Norris-LaGuardia Act beyond that point . . ." 2 Leg. Hist. 1364. Donnell asked Smith why an injured party should not be permitted to go to court and "control his own litigation." 2 Leg. Hist. 1364. Smith replied: "... I admit that secondary boycotts and jurisdictional strikes are indefensible; but questions will arise with respect to which discretion may be needed, and I believe that the Board can serve a very useful function . . ." 2 Leg. Hist. 1365.[20]

[20] For example, in any given case under Section 10(l), the Regional Director may calculate that by the time an appeal from the denial of an injunction is concluded, the Board will have decided the case on its merits and that therefore an appeal would be useless; or the Regional Director may determine that the decision of the district court defying an injunction was so carefully reasoned and persuasive on its face as to make reversal highly improbable and that therefore the expenditure of public time and money on an appeal would be unwarranted. Charging parties are not apt to be attentive to such considerations in their haste to engage the processes of the Courts of Appeals in their own protection.

During the course of this debate, there was pending a substitute measure offered by Senator Taft which would permit employers to seek *damages* in the courts by virtue of violations of Section 8(b)(4).[21] Taft, the principal sponsor of S. 1126, rose to withdraw his substitute, promising to offer it at a later time, with this comment:

> "I found that *opposition to restoring the injunctive process, even in cases of secondary boycotts and jurisdictional strikes, seemed to be so strong,* and I am so anxious to retain provisions covering the right of direct action in suits brought for damages in cases of that kind, that I have determined that I shall vote against the Ball amendment and then offer the substitute . . ." 2 Leg. Hist. 1365.

The Ball amendment was defeated by a vote of 62 to 28. 2 Leg. Hist. 1369-1370.

When Taft re-offered his Section 303 amendment, he was careful to assure the Senate that his amendment was not intended to permit injunctions in contravention of Norris-LaGuardia. 2 Leg. Hist. 1370-1371, 1381, 1396. Said Taft: "That is the reason I yielded my position, because the feeling, the sentiment against suspending the Norris-LaGuardia Act was so strong." 2 Leg. Hist. 1381.[22]

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[21] The measure was ultimately enacted as Section 303 of the Act (see Appendix to this brief).

[22] There was one final, limited, effort to make the injunction remedy available to private parties. Senator Aiken offered an amendment which would have allowed private persons to obtain injunctions in the District Courts where a violation of Section 8(b)(4) threatened destruction or spoilage of "perishable agricultural commodities." It too was defeated. 2 Leg. Hist. 1375, 1389-1390.

On June 5, 1947, after exhaustive debate and a conference between the House and Senate to resolve their differences, Taft reported that the House version of Sestion 10(l) had been eliminated. 2 Leg. Hist. 1540: "... [I]n such cases the injunction can be obtained only through the National Labor Relations Board. In that respect the House accepted entirely the provisions of the Senate bill." 2 Leg. Hist. 1544. The House Conference Report No. 510 on H.R. 3020 stated: "... the House bill, in Section 12, provided for injunctions at the request of private persons, rather than by the Board, in cases like these. The conference agreement adopts the procedure of the Senate amendment." 1 Leg. Hist. 561. The fight was over.

From the foregoing, particularly the debates regarding the Ball amendment, it is manifest that in relation to injunctive relief the conflict in the Congress was over who should be entitled "to control the litigation," to "approach" the courts, to "request" relief.[23] Proposals which would have placed such rights in the hands of private litigants were firmly rejected. It cannot be doubted that to allow the Petitioner to appeal the denial of an injunction under Section 10(l), where the Board does not appeal, is to permit it "to control the litigation," "approach" the courts for an injunction, "request" injunctive relief or, as Peti-

[23] Petitioner would have us believe that the sole issue involved "the right to initiate injunction suits;" that once the Board petitioned for injunctive relief, the initiative in the injunctive process was up for grabs; that as part of a "compromise" the Section was drafted expressly to confer on charging parties full party status. (Pet. Brief 29). The short answer is that these assertions find no support in the legislative history. The only "compromise" revealed was that in exchange for obtaining any injunctive relief at all, limited at that to a certain class of cases, proponents of the bill had to give up entirely the notion that private parties would be entitled to such relief on an independent basis.

tioner would have it, "initiate" injunctive action. In light of the "fear" expressed by the legislators that they might "end with no legislation at all" (2 Leg. Hist. 1057-1058) because of the "strong" opposition to "restoring the injunctive process" to private hands (2 Leg. Hist. 1365), Congress plainly rejected the Petitioner's right to control 10(l) litigation. This understanding of the legislative mood in 1947 is of paramount importance, for it compels the construction of Section 10(l) which was adopted by the Court below.

C. Decisions of the Courts.

In 1948, a year after the enactment of the Taft-Hartley Act and with the legislative history fresh in its mind, this Court said: "The short answer to the argument that the Labor-Management Relations Act of 1947, 61 Stat. 136, 149, § 10(h), has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed *only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party.*" (emphasis added). *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442 (1948).

That the import of the legislative history was to vest in the Board sole control over Section 10(l) litigation was again recognized by this Court in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). There, in a suit brought under Section 301 of the Labor-Management Relations Act,[21] Sinclair sought an injunction

[21] Section 301 vests in the district courts jurisdiction over suits "for violation of contracts between an employer and a labor organizations."

against alleged work stoppages in violation of compulsory arbitration and no-strike provisions of its collective bargaining agreement with the union. The issue, as the majority saw it, was whether Section 301 impliedly repealed Section 4 of the Norris-LaGuardia Act. In responding to the issue in the negative, and holding that the activity complained of could not be enjoined, the majority opinion observed that if Congress had intended Section 301 to effect a partial repeal of the Norris-LaGuardia Act, it would have said so expressly. "That is indeed precisely what Congress did do in §§ 10 (h) and 208 (b) of the Taft-Hartley Act, *by permitting injunctions to be obtained, not by private litigants, but only at the instance of the National Labor Relations Board* and the Attorney General, and in § 302 (e), by permitting private litigants to obtain injunctions in order to protect the integrity of employees' collective bargaining representatives in carrying out their responsibilities." (at 204-205) (emphasis supplied). The dissenters did not disagree with this point. They argued that assuming Congress did not intend to repeal § 4 of the Norris-LaGuardia Act by enacting Section 301 of the Labor Management Relations Act, it was still necessary for the Courts to accommodate the conflict between the anti-injunctive policy of the former and the policy of the latter favoring enforcement of agreements to arbitrate disputes. That this was the basis of the dissent was made plain in *Teamsters v. Village Transit*, 370 U.S. 711 (1962), where the issue was the same. The Court reversed a decision of the lower court granting an injunction, on the basis of *Sinclair*. The dissenters in *Sinclair* concurred in *Village Transit* on the ground that "the collective bargaining agreement involved in this case does not bind either party to arbitrate any dispute." (at

Of course, the instant case does not present the "accommodation" issue that troubled the dissenters in *Sinclair*. We may therefore assume that the *Sinclair* Court was united in the view that Section 10(l) permitted "injunctions to be obtained . . . only at the instance of the National Labor Relations Board." (370 U. S. at 204-205).

In obedience to that principle, lower courts have denied to charging parties in Section 10(l) proceedings the right to pursue injunctive relief by urging positions different from or independent of those taken by the Regional Director (*McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 242, 243 (2d Cir. 1962); *NLRB* v. *Retail Store Employees Union*, 243 F. 2d 777, 782-783 (9th Cir. 1956)), as well as the right to intervene. *Regalbuto* v. *Marlene Industries Corp.*, 253 F. Supp. 722 (D.C.N.Y. 1966); *Phillips* v. *United Mine Workers of America*, 218 F. Supp. 184 (D.C. Tenn. 1963); *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, —— F. 2d ——, 69 LRRM 2865 (9th Cir. 1968), *cert. den.* 393 U.S. 926 (1968); *Hernandez* v. *Local 701, Operating Engineers*, —— F. 2d ——, 73 L.R.R.M. 2111 (9th Cir. 1969).[2]

[2] The International Federation, as *amicus*, cites *McLeod* v. *General Electric Co.* and *NLRB* v. *Nashville Building and Construction Trades Council* (ARF Brief, p. 8, fn. 15) in support of its contention that "the Second and Sixth Circuits have, conversely, unconditionally permitted such intervention." In *McLeod*, the name of the charging party appears as "intervenor" in the caption, but the Court's opinion does not address the point and there is no indication that intervention was contested. In the Sixth Circuit case, there was before it a Section 10(e) petition for enforcement filed by the Board on the merits of the controversy, a Section 10(j) request and a writ of mandamus filed by the Union. The employer was allowed to intervene in the [illegible] on the strength of this Court's decision in *Nashville*, cited heading D.

D. Petitioner's Reliance on Scofield and Food Employers Council Is Misplaced.

1. Petitioner places primary reliance on *Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965), wherein this Court held that successful charged parties and charging parties should be allowed to intervene in Court of Appeals review cases. But *Scofield* is inapposite.

A Section 10(k) proceeding "is independent of that on the merits,"[26] and the two types of proceedings involve "significantly different considerations and legislative purposes."[27] Review cases under Sections 10(e) and (f) involve none of the Norris-LaGuardia considerations that shaped the enactment of Section 10(k). For that reason two differing lines of authority have developed over the years. In review cases, headed by *Scofield*, the "public versus private interests" shibboleth has been attenuated and the scope of participation on the part of private litigants has been considerably broadened. In injunction cases, on the other hand, the firm line of authority[28] has denied to private litigants the right to initiate, control, or shape the proceedings.

Moreover, *Scofield* was based on this Court's view that to deny intervention to successful charged and charging parties in the first review on the merits would probably result in additional, duplicative appeals, with attendant "circuit shopping," and a delay of the time when disaffected parties could seek review in this Court. Of course, the denial of the right of private

[26] *Labor Board* v. *Denver Building Council*, 341 U.S. 675, 682 (1951).

[27] *Local 1976, Carpenters* v. *NLRB*, 357 U.S. 93, 110 (1958).

[28] See cases cited under subheading C, *supra*.

litigants to appeal in Section 10(l) cases would have no such effects." Therefore, the court below was correct in distinguishing *Scofield* on these grounds, as were the courts in *Reynolds* v. *Marlene Industries*, 250 F. Supp. 722, 723 (D.C.N.Y. 1966), and *Henderson* v. *Local 701, Operating Engineers*, —— F. 2d ——, 73 LRRM 2111, 2114, fn. 2 (9th Cir. 1969), and Moore in 3B Moore's Federal Practice, Para. 24.06, p. "24-131" (2d ed. 1969).

2. In support of the proposition that its appeal should be allowed because it seeks merely to "support" the Regional Director's petition for injunction, the Petitioner relies heavily on *Retail Clerks* v. *Food Employers Council*, 351 F. 2d 525 (9th Cir. 1965) (Pet. Brief, p. 33). There, having found cause to believe that Section 8(e) had been violated, the Regional Director filed a petition in District Court for a 10(l) injunction. Subsequently, however, the court approved a stipulation between the Regional Director and the Union whereby the latter agreed not to implement the contractual clause under attack, pending the Board's determination on the merits. The petition for injunction was dismissed. Later still, the Union took action which the Regional Director believed to be in conflict with the stipulation. Accordingly, he filed a new 10(l) petition in the District Court. Again the Union and

[2] In distinguishing *Amalgamated Utility Workers* v. *Consolidated Edison Company*, 309 U.S. 261 (1940), the Court in *Scofield* said: "We find nothing inconsistent in denying the right of a private party to institute a contempt proceeding where the Board's expertness in achieving compliance with orders is challenged, and on the other hand, in permitting intervention *in a proceeding already in the court* (emphasis added). In the instant case, Petitioner seeks to institute the appellate proceeding, not merely to participate "in a proceeding already in the court."

Regional Director sought court approval of a stipulation, and the charging parties opposed the stipulation. The court entered a temporary injunction and, on appeal by the Regional Director and the Union, the Ninth Circuit affirmed. The Court of Appeals rejected the argument that under Section 10(l) the district court was precluded from issuing an injunction in the face of the Regional Director's request that its petition be dismissed. It noted, correctly, that the district court is not "a mere rubber stamp for the Regional Director," and that the statute "places in the district court the discretion as to the form of relief to be granted." (at 530, 531). Thus the holding of the case is not that *the charging party* may adopt a course independent of that taken by the Regional Director, but that *the district court* may do so in the exercise of its discretion as to the form of relief to be granted—a proposition not at all inconsistent with the position taken by Respondents in the instant case. Moreover, in distinguishing *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, and *NLRB* v. *Retail Clerks* (supra, sub heading C), the Court of Appeals observed that, unlike the conduct of the charging parties in those two cases, the charging parties here "did not petition the court independently, or for relief different than that sought by the Regional Director . . ." (at 529). But, in the instant case, the Petitioner is seeking the right to petition the Court of Appeals "independently," and in appealing in the face of the Regional Director's decision not to do so — "for relief different than that sought by the Regional Director."

In a footnoted dictum (fn. 28) the court goes on to say that even if it could be stated that the charging parties had procured the injunction on their own, it

would not necessarily constitute reversible error since the strict dichotomy between public and private rights has been "justly criticized." The dictum is wrong; it overlooks the vital distinction between review and injunction cases (*supra*); and it is in conflict with that court's own decisions in *NLRB v. Retail Clerks Union*, 243 F. 2d 775, 782-783 (9th Cir. 1956); *San Francisco-Oakland Newspaper Guild v. Kennedy*, — F. 2d —, 69 LRRM 2855 (9th Cir. 1968), cert. den. 393 U.S. 926 (1968); and *Henderson v. Local 501, Operating Engineers*, — F. 2d —, 73 LRRM 2111, 2114, fn. 2 (9th Cir. 1969).

In fact, in denying intervention to the charging party in *Henderson*, the Ninth Circuit distinguished *Food Employers* and ignored its dictum, and followed the decision of the Tenth Circuit in this case which also distinguished *Food Employers*.

E. Other Contentions Raised by Petitioner

1. The Petitioner seeks to import into Section 10(l) its right to independently appeal from the denial of an injunction, by analogy to the right of review given to other persons, in other contexts, under other statutes (Pet. Brief, pp. 21, 46-47). The short answer is that whether one speaks of appeal rights or intervention rights (Pet. Brief, p. 47), "federal agencies are not fungibles . . . and Congress has treated the matter with attention to the particular statutory scheme and agency. . . . [N]or should a determination under one statute be mechanically carried over in the interpretation of another statute involving significantly different

[illegible] 380 U.S. 205, 210 (1965). See also, 3B Moore's Federal Practice, para. 24.06, pp. "24-111" and "24-115" (2d ed. 1969).

considerations and legislative purposes." *Local 1976, Carpenters v. NLRB*, 357 U.S. 93, 110 (1958).

2. Petitioner relies on Moore's statement (Pet. Br. p. 16) that "[w]here a statute gives an absolute right to be heard, which is tantamount to formal intervention, there is a concomitant right of appeal, except where the statute itself precludes an appeal. 4 Moore, Federal Practice 104 (2d ed. 1963)." But Moore could not have been speaking in support of the Petitioner's position here. For in another paragraph of the same volume he said: "Where the prevention of multiple appeals is not at stake, the rule [to appeal] should not apply. Thus when the NLRB seeks to restrain unfair labor practices and obtains a decree granting injunctive relief against the unfair labor practices pending Board proceedings, the charging party has no right to intervene."

3. The Petitioner's "due process" argument (Pet. Br. p. 13) fails because the Constitution does not require that litigants be afforded a right or opportunity to appeal. *McKane v. Durston*, 153 U.S. 684, 687 (1894). Moreover, Petitioner's citation of such cases as *Griffin v. Illinois*, 351 U.S. 12 (1956) (Pet. Br. p. 13) does not aid

5. The Petitioner's further contention (Pet. Br., p. 16, fn. 1) that to deprive it of the right to appeal in Section 10(l) cases is to deprive it of any meaningful "remedy" is patently specious. It overlooks the fact that the charging party has the right to have its claim litigated on the merits before the Board and the Courts and, as we have seen, to participate fully in those proceedings; that it has the additional right to sue the offending union for damages under Section 303 of the Act (see Appendix to this Brief); that 10(l) proceedings are designed merely to afford temporary *pendente lite* protection in aid of the Board's process and are ancillary to the proceedings on the merits; that Section 10(l) relief may be obtained at the behest of the Board; and if further such relief is necessary during the course of appeals it may be obtained by the Board under Section 10(e) and (f) of the Act. Thus charging parties are amply protected.

In fact, the Board's control of injunction actions works to the advantage, not detriment, of charging-party employers. For it enables them to obtain the protection of injunctions secured by the Board without being encumbered by the bond or security requirements imposed on private litigants in other causes pursuant to Rules 62(c) and 65(c) of the Federal Rules of Civil Procedure, or by defenses normally available to opposing parties in courts of equity. See, *e.g., Henderson v. Local 701, Operating Engineers*, — F.2d —, 73 LRRM 2111, 2115 (9th Cir. 1969), in which it was held that the "unclean hands" defense was not available against the Board in a Section 10(l) proceeding.

6. The Petitioner argues that since "Congress created a substantive right on behalf of charging parties to an injunction of secondary boycotts," it must have

intended to afford them relief from a denial of that right when the Board declines to appeal. (Pet. Br., pp. 16-17). The premise of the argument is wrong. As we have shown, Congress created no such "substantive right." If it had, the Petitioner's argument would logically lead it to conclude that it could petition the district court for the injunction in the first place. And that even the Petitioner concedes it may not do.

CONCLUSION

For the reasons stated, the Court is urged to dismiss the case as moot or, in the alternative, to affirm the decision of the court below.

Respectfully submitted,

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APPENDIX

Statutes Involved

National Labor Relations Act
(61 Stat. S.136, 29 U.S.C. Section 151, et seq.)

Sec. 303 (29 U.S.C. Section 187):

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Norris LaGuardia Act
(47 Stat. 70, 29 U.S.C. Sections 101, 102, 104 and 107):

§ 101. Issuance of restraining orders and injunctions; limitations; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§ 102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

§ 101. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or per-

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings.

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complainant made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no temporary restraining order shall be issued on account of any threat or unlawful act except against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

That substantial and irreparable injury to complainant's property will follow;

That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of such relief;

That complainant has no adequate remedy at law; and

That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property. *Provided, however*, that if a complainant shall also allege that, unless a temporary restraining order shall be issued with all notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs, together with a reasonable attorney's fee, and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing had after notice and upon motion of which hearing complainant and surety

shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.